IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1320

RAYMOND KASSEL, *et al.*,
Appellants,

v.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,
A Delaware Corporation,
Appellee.

On Appeal from the United States Court of Appeals for the Eighth Circuit

REPLY TO MOTION TO AFFIRM

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REPLY TO MOTION TO AFFIRM

Consolidated Freightways, in its Motion to Affirm, makes several contentions that warrant a brief reply.

First, the Motion is premised upon a faulty articulation of the issues below. CF continues to suggest that Iowa discriminates against double-bottoms because of their configuration and that they should prevail if a trial court finds as a matter of adjudicative fact that a particular vehicle excluded by a generally applicable length limitation is as safe or safer than other shorter vehicles which a state permits to operate on its highways. Iowa

allows double-botton trucks on its highways. Iowa has allowed double bottom trucks to operate at sixty feet, five feet longer than semi-trailers may operate. Sixty-five foot doubles are excluded not because of their configuration, but because they are too long.

Iowa contends that this result is consistent with the dormant commerce clause because the record reflects that length is related to safety and because CF has not shown that the particular line-drawing in the Iowa statute is irrational. CF's Motion to Affirm makes their real contention more visible. CF's true contention is that a state may not regulate vehicle length by general classification. Rather, they claim the dormant commerce clause empowers a federal district court to evaluate the safety hazards of a particular type of vehicle on a particular category of road and order a state to permit the operation of that vehicle on that category of road if it concludes by a preponderance of the evidence that the vehicle is as safe as others permitted on that road by the state. The courts below implicitly accepted that claim. This Court should not.

Second, it should be noted that CF concedes a general relationship between length and safety. Motion to Affirm at 15. They suggest the relationship is not simple. Of course it is not simple. Indeed, it is still being studied by federal authorities. But it does not follow that a state may not regulate by rational classification and must rather make individualized safety determination for every vehicle an interstate carrier may wish to operate.

Third, CF claims that this case is controlled by *Raymond* and that Iowa is simply seeking to reargue that recent decision. Not surprisingly, CF chooses to ignore totally the argument presented in Appellant's Jurisdictional Statement. That argument need not be restated here. Suffice it to say Iowa argues that the courts below

seriously misinterpreted *Raymond*, with the result that the states may no longer regulate vehicle size. The need to alleviate this substantial departure from accepted principles of dormant commerce clause analysis plainly makes the question presented substantial.

Fourth, CF notes that *Raymond* may be reconciled with the Court's decision in *Brotherhood of Locomotive Firemen & Enginemen.* Motion to Affirm at 6, n. 3. Iowa could not agree more. What cannot be reconciled with *Brotherhood*, as Judge Henley noted, is the decision of the courts below in this case. Were this Court to grant CF's Motion to Affirm, *Brotherhood* would be overruled *sub silentio.*

Finally, CF seems to respond to Iowa's contention that the decision below spells an end to state regulation of vehicle size by the suggestion that only the Iowa statute has been invalidated. Motion to Affirm at 18-19. The record reflects that most eastern and southeastern states do not permit sixty-five foot doubles to operate on their highways. Motion to Affirm at 4a. But it is the Constitution of the United States we are expounding. It cannot be the case that doubles may be prohibited in Georgia while operating under federal court order in Iowa. A constitutional analysis which even suggests such a result is possible is palpably unsound. Moreover, focussing on the prohibition of doubles in the East and Southeast lays bare one of the principal reasons why the decisions of the courts below are unsound. CF claims interstate commerce is burdened because Iowa's limitation, in an area of the country where sixty-five foot doubles are generally permitted, forces it to "divert" its equipment through other states. No such claim is or can be made for the East and Southeast. CF notes: "CF operates twin trailers in those states where they are legal; it operates only semis in the East and Southeast." Motion to Affirm at 4a. CF goes on to claim that the southern trans-

continental route has considerable semi traffic (but that the central route is almost entirely twin traffic. *Id.* at n.14. Thus, Iowa's length limitation is no more inherently burdensome than Georgia's. The so-called "burden" is entirely a function of CF's voluntary business decisions and the legislative decisions of other midwestern states. CF is not "burdened" in the East and Southeast because it made a different business decision. This Court should not permit CF to succeed in bootstrapping its way over reasonable state limitations on vehicle length.

CONCLUSION

For these additional reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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